No. 96-272

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
v.
JOHN RAMBO, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Waterfront Employers, Master Contracting Stevedore Association of the Pacific Coast, Inc., Shipbuilders Council of America, the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amicus curiae* in support of Petitioner, Metropolitan Stevedore Company.

The Petitioner has consented in writing to the filing of a brief *amici curiae* on its behalf. The Federal Respondent has also consented. Letters of consent have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Court. Respondent has not so consented.

The National Association of Waterfront Employers (NAWE), formerly the National Association of Steve-

dores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the Distirct of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon, Washington, Alaska and Hawaii and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 8,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and the largest group self-insurance facility authorized to write LHWCA coverage, and thus have an interest in the proper payment of disability benefits to a claimant whose original award is modified due of an increased wage-earning capacity. These *amici* also participated as *amicus* in *Metropolitan Stevedore Company v. Rambo* (*Rambo I*), —— U.S. ——, 115 S.Ct. 2144 (1955).

Accordingly *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the Petitioner.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth

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Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation

Act and the largest group self-insurance facility authorized to write LHWCA coverage, and thus have an interest in the proper payment of disability benefits to a claimant whose original award is modified due of an increased wage-earning capacity. These *amici* also participated as *amicus* in *Metropolitan Stevedoring Company v. Rambo* (*Rambo I*), —— U.S. ——, 115 S.Ct. 2144 (1995).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below, reading into § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act") a non-existent provision for a "nominal award," ignores the plain text of the statute and Congressional intent. The court exceeded its review authority under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, by not considering the record as a whole, ignored the APA's evidentiary requirements, and usurped the policy making role of the Congress in violation of the separation of powers doctrine of the Constitution.

ARGUMENT

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), is a federal workers' compensation statute designed to provide indemnity compensation and medical benefits to certain classes of maritime employees injured on covered worksites. *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249 (1977). LHWCA § 8, 33 U.S.C. § 908, sets forth four distinct classifications of indemnity benefits, labeled "disability" benefits, designed to recompense disabled workers according to the severity and length of their disabilities. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980).

In turn, LHWCA § 2(10) expressly defines the term "disability" to mean, in pertinent part, "incapacity because

of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment [.]"

This wage-earning capacity concept is found throughout § 8 of the Act. Congress expressly incorporated it into the two disability classifications that are "partial" in character, including that governing an award of permanent partial benefits, the type of award made in satisfaction of Respondent's initial claim.[1] A change in conditions, including a change in claimant's economic condition, e.g., an increased wage-earning capacity, permits a LHWCA § 22 modification request. *Metropolitan Stevedore Co. v. Rambo,* —— U.S. —— (1995) (*"Rambo I"*).

In analyzing an initial claim for § 8 disability or a § 22 request for modification, the Department of Labor applies the essential wage-earning capacity factors found in LHWCA § 8(h), including the economic factors allowed by this Court in *Rambo I.*[2] Actual earnings is the

[1] The statutory definitions read as follows: "In all other cases in the class of [permanent partial] disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21); "Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years." LHWCA § 8(e), 33 U.S.C. § 908(e).

[2] Many elements of the Department of Labor are involved in the LHWCA statutory scheme. Disputed claims are initially decided by an ALJ. Review is to the Benefits Review Board ("BRB"). The Act is administered, however, by the Director, Office of Workers' Compensation Programs ("OWCP"). See *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* —— U.S. ——, 115 S.Ct. 1278 (1995).

starting point, with the Department of Labor required to consider the complete range of statutory factors if such earnings do not fairly and reasonably represent a claimant's wage-earning capacity. These factors include "the nature of [ ] injury, the degree of physical impairment, [the claimant's] usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition[]" and fix such capacity "in the interests of justice." Notably, the Department is authorized to take into account the effect of a disability "as it may naturally extend into the future.[3]

The text of the Act describing each of these disability classifications, other than the section dealing with a permanent total disability, expressly requires payment of the specified benefit, but only "during the continuance" of the disability, i.e., the "incapacity . . . to earn the wages which the employee was receiving at the time of injury at the same or any other employment." See LHWCA §§ 8(b), 8(c)(21), and 8(e). This limitation on benefit payments has been an integral part of the Act since its enactment in 1927, and was recognized by this Court in *Rambo I,* Slip Opinion at 6.

Moreover, as this Court recognized in *Rambo I,* a § 22 modification must be requested within one year of the last payment of compensation. The Act makes no provision for a "nominal award" designed to extend indefinitely the modification period.[4]

[3] Accordingly, under certain conditions, a claimant may be found to be disabled, either at an initial hearing or at a § 22 modification proceeding, and given an award even though he has actual wages because, after considering all of § 8(h)'s economic factors, the claimant is deemed to be without his wage-earning capacity at the time of the injury. The concept of a "nominal award," on the other hand, presupposes no loss of wage earning capacity.

[4] Under current practice the Respondent could claim a reduced wage earning capacity even at or after retirement. Unlike approximately one half of the state compensation acts and the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.,* the LHWCA

The Circuit Court, however, disregarded these statutory limitations and directed the Benefits Review Board to award a "nominal award" because *it* perceived a "significant possibility" that Respondent will at some future time suffer economic harm even though the trier of fact perceived no such possibility. Thus, the court has laid down a rule of law equally applicable to every § 22 request to modify an award of permanent benefits. In so doing the court exceeded its review authority under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, ignored the evidentiary provisions of the APA, and usurped the policy making role of the Congress.

I. THE DECISION BELOW VIOLATES TWO CRITICAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT: THE § 706 STANDARDS GOVERNING JUDICIAL REVIEW AND THE § 556(d) STANDARDS GOVERNING THE BURDEN OF PROOF AND EVIDENCE.

A. The Court Below Ignored the Whole Record and Substituted Its Judgment for That of the Administrative Factfinder in Violation of the Standards Governing Judicial Review.

Appellate review of a BRB decision is governed by the APA's review standards set forth at 5 U.S.C. § 706. The Court below rested its decision on its belief that the ALJ/BRB decision under review was not supported by the substantial evidence test set forth at 5 U.S.C. § 706 (2)(E). However, this belief and decision are not supported by the facts in this case.

In a review of an administrative adjudication, this court has held that the record must be considered as a whole, *Universal Camera v. NLRB*, 340 U.S. 474 (1951). Moreover, the reviewing court's scope of review under this provision of the APA is narrow and limited solely

does not require an election, a cessation of benefits, or a credit for employer funded pension and social security payments, at retirement.

to the question of whether or not the decision was supported by substantial evidence.

The ALJ below concluded that Respondent, trained in a new and more financially rewarding profession, no longer has an incapacity to earn the wages he was receiving at the time of his injury. Therefore, under the statutory scheme and definitions pointed out above, the ALJ concluded that the Respondent is no longer disabled and is ineligible for benefit payments of any amount. However, the circuit court ignored the factfinder's evaluation of Respondent's increased wage earning capacity and job market potential. Instead, it rested its decision on one highly speculative "fact": "Rambo testified that he didn't know how long his job as a crane operator would last." The court concluded that the ALJ overemphasized Respondent's current status and failed to consider the effect of his permanent partial disability on his future earnings.

Amici suggest that the court's analysis can hardly be construed as meeting *Universal Camera's* requisite directive to examine the whole record.[5] In fact, the court's analysis appears to be akin to a *de novo* review, substituting speculative thought for the substantial evidence of the greatly increased wage-earning capacity relied upon by the BRB and the ALJ.[6] If not an outright *de novo* review, it appears to *Amici* that the court resorted to

[5] *Amici* also note that this Court appears to have no problems with the ALJ's substantial evidence analysis, which took into account the whole record: "[T]he ALJ, recognizing that higher wages do not necessarily prove an increase in wage-earning capacity, *took care to account for* inflation and risk of job loss . . ." *Rambo I* (slip opinion at 10) (emphasis added).

[6] This Court has permitted *de novo* review under § 706 in only two circumstances, one of which is only applicable to a rulemaking proceeding. *De novo* review of whether or not the BRB decision was unwarranted by the facts is authorized by § 706(2)(F) when the proceeding is adjudicatory and the agency factfinding procedures are inadequate. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

devising its own evidence on the effects of Respondent's injury on his future earnings, even though virtually nothing was offered by way of evidence at the administrative level.

B. The Ninth Circuit's Decision Violates the APA by Placing the Burden of Persuasion on the Wrong Party and Substituting Speculation for the Substantial Evidence Standard.

LHWCA administrative adjudications are governed by the APA. LHWCA § 19(d) specifically requires that all LHWCA hearings be conducted in accordance with 5 U.S.C. § 554 and those additional APA sections incorporated by reference to § 554. 33 U.S.C. § 919(d).

In turn the APA requires that all LHWCA adjudications rest on substantial evidence. 5 U.S.C. § 556(d). The trier of fact may not make an award unless it meets the substantial evidence threshold. Moreover, as this Court recently held, § 556(d) also places the burden of persuasion on the party seeking an award or other order during a dispute over an award. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. ——, 114 S.Ct. 2251 (1994).

At the initial claim stage it is the claimant who bears the burden of persuasion to prove all of the necessary elements of his claim. Likewise an employer seeking a § 22 modification because of a "change in conditions" must bear the burden of proving to the satisfaction of the trier of fact that a claimant's "incapacity to earn wages" has changed sufficiently for a new order to be issued.

Just as clearly, a claimant seeking to retain a "nominal award" during a § 22 modification proceeding because of a "significant possibility" of future economic harm bears the burden of persuasion. It appears to *Amici* that the issue of future harm, raised below by the Respondent during the initial hearing although not supported by any hard evidence, was completely discounted by the ALJ.

The circuit court chose to ignore the entire matter of proof and evidence, instead ordering the BRB to award a nominal sum as a matter of law. This, too, runs contrary to this Court's decision in *Rambo I*: "[L]oss of wage-earning capacity is an element of the claimant's case . . . *a claimant is not 'disabled' unless he proves 'incapacity because of injury to earn the wages.'*" (Slip opinion at 5) (emphasis added).

II. THE NINTH CIRCUIT SUBSTITUTED ITS JUDGMENT FOR THAT OF CONGRESS, THUS USURPING THE POLICY MAKING ROLE OF CONGRESS.

The concept of a "nominal award" is not to be found in the Act or in corresponding OWCP regulations.[7] The court ignored the evidence credited by the ALJ and BRB, and handed down its own rule of law based on conjecture. This "rule" is equally applicable to every other request to modify an award for permanent disability benefits.

Amici realize that § 22's one year time limitation in practice may well be a strict rule. However, it is the rule that Congress has chosen.[8] Judicial amelioration diminishes the prospect of Congressional oversight and legislative correction. Ultimately it serves neither the interests of employers or employees covered by the Act.

However, in spite of Congress' express and clear rule, the circuit court chose to rest its decision on *its* judgment

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[7] The position advanced on behalf of the Director, OWCP is yet another in a long string of departmental litigating positions. It finds no support in the text of the statute or in OWCP regulations. While it has been accepted by several circuit courts over the years, the department's refusal to incorporate this judicial "mechanism" into its regulations reflects the Department's continuing disdain for the rulemaking processes required by the APA.

[8] As recently as 1984 Congress considered—but rejected—changing LHWCA § 22 and § 8(h) in a way that would have permitted Respondent to seek a § 22 modification in his own right at any point in the future. See S. Rept. 98-81 (May 10, 1983), pp. 37-38. However, the proposed changes discussed here were never enacted.

of what constitutes proper LHWCA legislative policy. In so doing the court usurped the policy making role of Congress in clear violation of the Constitution's separation of powers doctrine.

CONCLUSION

Amici respectfully submit that the decision of the U.S. Court of Appeals for the Ninth Circuit exceeds its statutory review authority, ignores the crucial evidentiary elements of the APA, and usurps the policy-making role of Congress, and therefore must be reversed.

Respectfully submitted,

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